

ROGER DAVIS,)	
)	
Petitioner,)	2:10-cv-02116-GMN-LRL
)	
vs.)	
)	ORDER
BRIAN WILLIAMS, <i>et al.</i> ,)	
)	
Respondents.)	

I. Procedural History

Petitioner filed a direct appeal. Exhibits 37 and 49. The Nevada Supreme Court affirmed the conviction. Exhibit 51. Thereafter, Petitioner filed a state post-conviction petition. Exhibit 54. That petition was denied. Exhibit 60. On appeal, the Nevada Supreme Court affirmed the lower

¹ The exhibits referenced in this Order were submitted by Respondents in support of their Motion to Dismiss and are found in the Court's docket at ECF Nos. 7 and 8.

1 court's decision. Exhibit 77. Petitioner filed his federal petition with this Court on December 6,
2 2010. Respondents move to dismiss.

3 **II. Discussion**

4 Petitioner raises three (3) grounds for relief in his federal petition:

5 I. The state district court improperly denied Davis's motion to withdraw his guilty plea
6 because:

- 7 A) the guilty plea was not knowing or voluntary; and
8 B) the guilty plea canvass was inadequate,

9 in violation of Davis's Fifth and Fourteenth Amendment rights to due process.

10 II. Davis received ineffective assistance of counsel when his trial counsel:

- 11 A. failed to investigate three witnesses or have them tested for psychological or
12 emotional impairment;
13 B. failed to inform the court at his plea agreement hearing that Davis was under the
14 influence of pain medication; and
15 C. failed to advise Davis to submit to a psychosexual examination prior to
16 sentencing,

17 in violation of Davis's Sixth and Fourteenth Amendment right to assistance of
18 counsel.

19 III. The state district court improperly relied on the more unfavorable of two pre-sentence
20 reports at sentencing, in violation of Davis's Fifth Amendment right to due process.

21 Respondents move for an order directing Petitioner to submit a supplemental signature page
22 to his Petition and to dismiss the Petition contending that ground 1 (B), ground 2 (A) and (B) and
23 ground 3 remain unexhausted.

24 The request for a supplemental signature shall be denied. Respondents will find Petitioner's
25 signed verification of the Petition on page 7-B and page 9 thereof.

26 A. Exhaustion

A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has
exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28

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U.S.C. § 2254(b).² State remedies have not been exhausted unless the claim has been fairly presented to the state courts. *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). To fairly present a federal claim to the state court, the petitioner must alert the court to the fact that he asserts a claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999), *cert. denied*, 529 U.S. 1009 (2000), *citing Duncan*, 513 U.S. at 365-66. The petitioner must make the federal nature of the claim “explicit either by citing federal law or the decisions of the federal courts.” *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended*, 247 F.3d 904 (9th Cir. 2001). Additionally, a pro se petitioner may exhaust his claim by citing to State case law which applies the federal standard. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (2003) (“citation to a state case analyzing a federal constitutional issues serves the same purpose as a citation to a federal case analyzing such an issue”).

The mere similarity of claims of state and federal error is insufficient to establish exhaustion. *Hiivala*, 195 F.3d at 1106, *citing Duncan*, 513 U.S. at 366; *see also Lyons*, 232 F.3d at 668-69; *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). “[G]eneral appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106, *citing Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *see also Shumway*, 223 F.3d at 987.

² 28 U.S.C. § 2254(b) states, in pertinent part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that: (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available state corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

* * *

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

1 The fact that the state court does not explicitly rule on the merits of Petitioner's claims is
2 irrelevant, because exhaustion requires only that the state court be given the opportunity to consider
3 the claims that have been presented. *Smith v. Digmon*, 434 U.S. 332, 333-334, 98 S.Ct. 257, 258
4 (1978); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985); accord *Carter v. Estelle*, 677 F.2d
5 427 (5th Cir. 1982) and *United States ex rel. Giesler v. Walters*, 510 F.2d 887, 892 (3d Cir. 1975).

6 Petitioner argues that all of his claims have been exhausted through their presentation to the
7 state court. He further contends that the Nevada Supreme Court considered the claims in their
8 Orders of Affirmance filed on February 11, 2008 (Exhibit 51) and December 23, 2009 (Exhibit 77).

9 Ground 1 (B), claiming that the canvass at the entry of plea was inadequate does not appear
10 to have been presented to the Nevada Supreme Court in any context. It was not raised as part of the
11 direct appeal. Neither was it included in the Fast Track Appeal Statement filed on appeal from post-
12 conviction. Ground 1 (B) is unexhausted.

13 Having reviewed the Fast Track Appeal Statements filed in Petitioner's direct appeal and in
14 his appeal from denial of post-conviction review along with orders of the Nevada Supreme Court
15 deciding those appeals, the Court finds that Petitioner did, in fact, raise and exhaust ground 2(a) on
16 direct appeal. See Exhibit 51, p 1. The Nevada Supreme Court acknowledged and considered a
17 claim that counsel was ineffective for "failing to investigate." The Court noted, "Davis alleges that
18 defense counsel should have interviewed percipient witnesses and requested physical and
19 psychological examinations of the victim." *Id.* This claim is the same as Petitioner's present claim
20 that he received ineffective assistance of counsel where counsel "failed to investigate three witnesses
21 or have them tested for psychological or emotional impairment." While this is a slightly more
22 specific statement of the facts to support his claim than was presented in the Fast Track Appeal
23 Statement (Exhibit 49, pp. 7 and 8), the additional specificity does not alter the basic nature of the
24 claim. *Luna v. Cambra* 306 F.3d 954, 965 (9th Cir. 2002) as amended by 311 F.3d 928 (9th Cir.
25 2002); *Demarest v. Price* 130 F.3d 922, 932 (10th Cir. 1997).

26 Ground 2 (B) is also exhausted as it, too, was presented to the Nevada Supreme Court on

1 direct appeal. Respondents' argument that the facts were raised in the context of a due process
2 claim, but not as an ineffective assistance of counsel claim, is misplaced. The brief clearly sets out
3 ineffective assistance as a basis for the Court to have allowed Petitioner to withdraw his guilty plea.
4 The facts related to Petitioner's medication at the time of entry of the plea were discussed in the
5 context of counsel's knowledge and awareness of that medication and its effects on Petitioner, as
6 well as its impact on the voluntary and knowing nature of the plea. Ground 2 is exhausted.

7 Ground 3 raised a due process violation in that Petitioner believed the Court improperly
8 relied on a less favorable pre-sentence report than another report that was available. On direct
9 appeal, these facts were presented. However, they were presented as support for the ineffective
10 assistance of sentencing counsel claim, to highlight defense counsels' decision to advise Petitioner
11 not to participate in a psychosexual evaluation prior to the Court's entry of a decision on his Motion
12 to Withdraw the Guilty Plea. The claim was not presented as a free-standing due process claim. It is
13 unexhausted.

14 Based on these findings, the Court is faced with a mixed Petition.

15 V. Petitioner's Mixed Petition

16 The Court finds ground 1 (B) and ground 3 of the petition to be unexhausted in state court.
17 Consequently, the Court finds the Petition in this action to be a "mixed" Petition -- one containing
18 both claims exhausted in state court and claims not exhausted in state court. As such, the entire
19 Petition is subject to dismissal, unless Petitioner elects to abandon the unexhausted claims. *See Rose*
20 *v. Lundy*, 455 U.S. 509, 521-22 (1982); *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir.1983).

21 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed some limitations upon
22 the discretion of this Court to facilitate habeas petitioners' return to state court to exhaust claims.

23 The *Rhines* Court stated:

24 [S]tay and abeyance should be available only in limited circumstances.
25 Because granting a stay effectively excuses a petitioner's failure to present his
26 claims first to the state courts, stay and abeyance is only appropriate when the
district court determines there was good cause for the petitioner's failure to
exhaust his claims first in state court. Moreover, even if a petitioner had
good cause for that failure, the district court would abuse its discretion if it

1 were to grant him a stay when his unexhausted claims are plainly meritless.
2 *Cf.* 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus
3 may be denied on the merits, notwithstanding the failure of the applicant to
4 exhaust the remedies available in the courts of the State”).

5 *Rhines*, 544 U.S. at 277.

6 Because the Petition is mixed, the Court will grant the Motion to Dismiss in part, and deny it
7 in part. However, in view of *Rhines*, before the Court determines how to handle Petitioner’s mixed
8 Petition, the Court will grant Petitioner an opportunity to show good cause for his failure to exhaust
9 his unexhausted claims in state court, and to present argument regarding the question whether or not
10 his unexhausted claims are plainly meritless. Respondents will be granted an opportunity to respond,
11 and Petitioner to reply.

12 Alternatively, Petitioner may advise the Court of his desire to abandon the unexhausted
13 claims by filing with the Court a sworn declaration of abandonment, signed by the Petitioner,
14 himself.

15 **IT IS THEREFORE ORDERED** that Respondents’ Motion to Dismiss (ECF No. 6) is
16 **GRANTED in part** and **DENIED in part**. The Court finds ground 1 (B) and ground 3 to be
17 unexhausted in state court. The Court further finds that Petitioner has provided a proper signed
18 verification of the Petition.

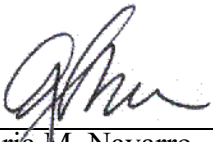
19 **IT IS FURTHER ORDERED** that Petitioner shall have thirty (30) days from the date of
20 entry of this order to show good cause for his failure to exhaust his unexhausted claims in state court,
21 and to present argument regarding the question whether or not his unexhausted claims are plainly
22 meritless. Respondents shall thereafter have twenty (20) days to respond. Petitioner shall thereafter
23 have fifteen (15) days to reply.

24 **IT IS FURTHER ORDERED** that alternatively, Petitioner may advise the Court of his
25 desire to abandon the unexhausted claims (ground 1 (B) and ground 3) by filing a sworn declaration
26 of abandonment, signed by the Petitioner, himself. This declaration shall be filed within the thirty
27 (30) days allowed to show cause for non-exhaustion.

1 **IT IS FURTHER ORDERED** that Petitioner's Motion for Appointment of Counsel (ECF
2 No. 16) is **DENIED**.

3 DATED this 26th day of May, 2011.

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Gloria M. Navarro
United States District Judge